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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

GREGORY HUGHES,

Defendant and Appellant.

H037665

(Santa Clara County

Super. Ct. No. C1093108)

Defendant Gregory Hughes brings this appeal from a judgment convicting him of criminal offenses. He asserts that the trial court erred in its determination of custody credits for presentence confinement and in its calculation of a restitution fine. We reject the first contention in conformity with a California Supreme Court decision issued while this appeal was pending. Respondent concedes error on the second point. We will therefore modify the judgment and affirm as modified.

**BACKGROUND**

Defendant was charged with criminal threatening (Pen. Code, § 422) and aggravated assault (*id.*, § 245, subd. (a)(1)) based on an altercation with his ex-wife. It was also alleged that he had sustained a prior conviction of residential burglary, constituting a serious felony under Penal Code sections 667.5 and 1192.7,

subdivision (c), as well as a strike prior under Penal Code section 667, subdivision (a), and 1192.7.

On March 9, 2011, defendant entered pleas of no contest to both counts in exchange for a dismissal of the “Prop 8 prior,” while reserving for determination the “legal issue o[f] whether or not the strike is a strike.” The court ruled that it was, but eventually struck the strike under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. On September 9, 2011, the court imposed a sentence of three years in prison. The court also imposed a restitution fine of \$1,600 “under the formula permitted by Penal Code section 1202.4(B),” together with a like fine, suspended, under Penal Code section 1202.45. The court allowed credit for presentence confinement, under Penal Code section 4019, of “282 actual plus 140 . . . for a total of 422.” Defendant took this timely appeal.

## **DISCUSSION**

### **I. Penal Code section 4019**

As in effect from September 28, 2010, through November 30, 2011, Penal Code section 4019, subdivision (f), allowed two days conduct credit for every four days actually served in county jail prior to sentencing. (Stats. 2010, ch. 426, § 2.) This meant that a person in defendant’s position would receive six days of total credit against his sentence (i.e., six days’ reduction in the time remaining to be served) for every four days of pre-sentence confinement. Penal Code section 2933 provided a more liberal formula, allowing one days’ credit for each day served; however, that provision was declared inapplicable to certain classes of prisoners, including those who, like defendant, had previously been convicted of a serious felony. (Former Pen. Code, § 2933, subd. (e); Stats. 2010, ch. 426, § 1.)

Effective October 1, 2011, Penal Code section 2933 was amended to eliminate any reference to a credit formula, and Penal Code section 4019 was amended to provide two

days of conduct credit for every two days served, in effect providing a slightly less liberal formula than Penal Code section 2933 had, but extending it to all prisoners.<sup>1</sup> (Pen. Code, § 4019, subd. (f); Stats. 2011, 1st Ex. Sess., ch. 12, §§ 16, 35.)

The September 2010 formula was in effect both when the offense here was committed and when the court sentenced defendant to prison. Not surprisingly, the trial court relied on that formula in granting defendant 140 days conduct credit for 282 days in actual custody. Defendant contends that he should instead have received credit under the 2011 formula, which would have granted 282 days conduct credit, 142 more than the trial court allowed.

There is no question that the result sought by defendant is contrary to the express language of the 2011 amendment, which declares that it “shall apply prospectively and . . . to prisoners who are confined . . . for a crime committed on or after October 1, 2011. *Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law.*” (Pen. Code, § 4019, subd. (h), italics added.) Defendant contends, however, that this limitation “violates his constitutional right to equal protection both facially and as applied,” and is therefore “void,” entitling him to the more liberal formula.<sup>2</sup>

Defendant challenges the statute’s disparate effect on persons who committed offenses before its effective date as contrasted with those who did so afterwards. But this

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<sup>1</sup> The current formula is less liberal than the one set forth in the 2011 version of Penal Code section 2933 in that prisoners do not receive conduct credit for odd days in custody; someone serving five days actual time receives four days conduct credit instead of five.

<sup>2</sup> As defendant correctly notes, “ ‘[t]he interpretation of a statute and the determination of its constitutionality are questions of law,’ with respect to which ‘appellate courts apply a de novo standard of review.’ [Citations.]” (*Valov v. Department of Motor Vehicles* (2005) 132 Cal.App.4th 1113, 1120.)

classification is overbroad as applied to defendant. He not only *committed his offense* before October 1, 2011, but also *completed his presentence confinement* before that date. The 2011 amendment distinguishes on both of these axes, first declaring itself applicable to “prisoners confined . . . for a *crime committed* on or after October 1, 2011,” but also declaring that “*days earned* by a prisoner prior to October 1, 2011” are to be credited “at the rate required by the prior law.” (Pen. Code, § 4019, subd. (h), italics added.) Even a successful challenge to disparate treatment based on the date of the offense would not invalidate disparate treatment based on the date when the underlying *confinement* occurs. To that extent his argument misses its mark. To invalidate the statute *as applicable to him*, he would have to demonstrate that it discriminates unlawfully between those who spent time in presentence confinement before its effective date—as defendant did—and those who underwent such confinement after that date—as he did not.

In *People v. Brown* (2012) 54 Cal.4th 314, 328-329 (*Brown*), the Supreme Court held that persons already sentenced when an earlier amendment took effect were not denied equal protection by failure to apply the amendment to them. The threshold requirement for an equal protection claim, wrote the court, “ ‘ “is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.” ’ [Citation.] ‘This initial inquiry is not whether persons are similarly situated for all purposes, but “whether they are similarly situated for purposes of the law challenged.” ’ [Citation.]” (*Id.* at p. 328, quoting *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.) “ ‘The obvious purpose of the new section,’ ” wrote the court, “ ‘is to affect the behavior of inmates by providing them with incentives to engage in productive work and maintain good conduct while they are in prison. . . . Thus, inmates were only similarly situated with respect to the purpose of [the new law] on [its effective date], when they were all aware that it was in effect and could choose to modify their behavior accordingly.’ ” (*Brown, supra*, at p. 329, quoting *In re Strick* (1983) 148 Cal.App.3d

906, 913.) This echoed a fuller discussion of the point earlier in the opinion, where the court observed that the purpose of the amendment before it was “ ‘to affect the behavior of inmates by providing them with incentives to engage in productive work and maintain good conduct while they are in prison . . . . [¶] It is fair to observe that this incentive purpose has no meaning if an inmate is unaware of it. The very concept demands prospective application. “Reason dictates that it is impossible to influence behavior after it has occurred.” ’ ([*Strick, supra*,] at p. 913, quoting *In re Stinnette* (1979) 94 Cal.App.3d 800, 806 [155 Cal. Rptr. 912].)” (*Brown, supra*, at p. 327.)

In short, the defendant was not situated similarly to those to whom he compared himself; therefore the disparity challenged by him was not subject to equal protection review, and no relief could be granted on that ground.

We see no reason to conclude that the reasoning in *Brown* is not equally applicable here. The court issued that decision after defendant had filed his opening brief here. In his reply brief he offers no sound reason not to follow it. He seeks to avoid its effect by noting that the Supreme Court did not consider “the question of standard of review,” i.e., whether the challenged disparity in treatment must survive “strict scrutiny” or need only possess a “rational basis.” (See *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200-1201.) But the court had no occasion to address that question, and neither do we, until the challenger is found to be situated similarly to those to whom he compares himself.

Defendant challenges as “backwards” the reasoning by which the Supreme Court resolved the “similarly situated” question. Even if we found his critique sound we would not be freed thereby to diverge from a square holding of the Supreme Court. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) But his critique is unsound. He complains that “[r]ather than looking at whether the classes are similarly situated before looking at the whether they are treated differently, *Brown*’s analysis flips it around and finds that the groups are dissimilar *because* they are treated differently.”

This is simply incorrect. In *Brown* the court said the relevant comparison is between a prisoner who, knowing the new formula has taken effect, is prospectively motivated thereby to behave in a manner that will earn credits; and one who, *having already served his presentence confinement*, seeks additional credit *after the fact*. As the court emphasized, the threshold inquiry is whether the two compared classes are “ ‘ “similarly situated *for purposes of the law challenged*.” ’ [Citation.]” (*Brown, supra*, 54 Cal.4th at p. 328, quoting *Cooley v. Superior Court, supra*, 29 Cal.4th 228, 253.) The central purpose of the “law challenged” is to reward good behavior during presentence confinement. People who have already undergone such confinement simply do not occupy the same position, with respect to the purpose of the law, as people who have not. We see nothing backwards about such reasoning.

Defendant takes issue with this analysis by focusing on the purpose of the 2011 *amendments* rather than of Penal Code section 4019 as a whole. He notes that the amendments were part of the Realignment Act of 2011, as it appears to be generally known. (See Stats. 2011, ch. 15, § 1 [“This act is titled and may be cited as the 2011 Realignment Legislation addressing public safety.”].) He asserts that the purpose of the Act “was ‘to manage and allocate criminal justice populations more cost effectively, generating savings that can be reinvested in evidence based strategies that increase public safety while holding offenders accountable.’ (Pen. Code, §17.5, subd. (a)(7).)” This slightly mischaracterizes the cited paragraph, which declares not the purpose of the Act as a whole but the purpose of “Justice reinvestment,” defined in the preceding sentence as “a data-driven approach to reduce corrections and related criminal justice spending and reinvest savings in strategies designed to increase public safety.” (Pen. Code, § 17.5, subd. (a)(7).) In any event it may be conceded that a purpose of the amendments was to save money. It does not follow that this the sole purpose by which the equal protection analysis may be informed. In liberalizing the formula for presentence credits the

Legislature was obviously not abandoning the underlying purpose of such credits, which is to encourage good behavior. It sought, rather, to strike a new balance among the competing considerations of adequate incentive, adequate punishment, and adequate savings. For purposes of striking that balance, persons who had already completed their presentence confinement were not situated similarly to those who had not, because the “incentive” element of the balance was entirely lacking.

Given this conclusion, we need not determine whether the challenged disparity must satisfy a compelling state interest or need only be rationally related to a legitimate state goal. Since defendant is not similarly situated to those to whom he compares himself, his equal protection challenge must fail.

## **II. *Restitution Fine***

At sentencing the trial court expressed an intention to impose a fine “under the formula permitted by Penal Code section 1202.4(b).” The only “formula” set forth in that subdivision, as in effect at all times relevant to this matter, was “two hundred dollars (\$200) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted.” (Former Pen. Code, § 1202.4, subd. (b)(2), as adopted by Stats.2010, ch. 351, § 9 [effective Sept. 27, 2010, through Jun. 30, 2011]; see Stats. 2011, ch. 45, § 1 [effective Jul. 1, 2011, to December 31, 2011].)

Here this formula would yield a fine of \$1,200, i.e., \$200 times two counts times three years. However the trial court, following a recommendation in the probation report, imposed a fine of \$1,600. The court had discretion to impose a fine up to \$10,000 (see Pen. Code, § 1202.4, subd. (b)(1)), but here it expressed an intention instead to follow the statutory formula. Respondent concedes that under these circumstances, the amount should be amended to conform to the formula.

**DISPOSITION**

The judgment is modified by striking the restitution fine of \$1,600 under Penal Code section 1202.4 and entering a fine of \$1,200 in its place, and by striking the parole revocation fine of \$1,600 under Penal Code section 1202.45 and entering a fine of \$1,200 in its place. As so modified, the judgment is affirmed.

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RUSHING, P.J.

WE CONCUR:

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PREMO, J.

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ELIA, J.